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MEMORANDUM

ON JURISDICTION OF COURTS

WITH RESPECT TO ORDERS OF THE

INTERSTATE COMMERCE COMMISSION

BY

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OUTLINE

The Interstate Commerce Commission is an administrative body to which has been confided certain powers with respect to interstate commerce; its duties are judicial and quasi-judicial, legislative, ministerial and administrative.

In performing these duties the Commission makes and enters certain orders and requirements; these usually follow hearings either upon complaint or in general investigations, which are by law authorized. Orders in form are either: (*a*) those granting relief, requiring a carrier to cease and desist from charging a particular rate or continuing to enforce a particular practice and pre-

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scribing another and less rate or different practice; or (*b*) one denying relief, as dismissing a formal complaint in which has been alleged the unreasonableness of a rate or practice.

Prior to the act of June 29, 1906, affirmative orders of the Commission were enforceable only in a proceeding in the United States courts, brought by the Commission or a party injured against the carriers. This procedure is still in the statute, but is not usually invoked, because by the act mentioned the orders and requirements were made self-executing, both in terms (it being provided within what time they might be made effective) and the failure to obey them probably subjects the offending official to heavy penalties.

Appreciating that the Commission might err and that the carriers are entitled under the Constitution to an exercise of the Federal judicial power the act of 1906 provided for the venue of suits brought "to enjoin, set aside, annul, or suspend any order or requirement of the Commission" and in such courts as the venue fixed "jurisdiction to hear and determine such suits is hereby vested."

By the act of 1910, this jurisdiction, along with three other classes of cases, was transferred to the Commerce Court, created by the act.

In the Commerce Court came to be filed cases to enjoin, set aside, annul, and suspend orders of the Commission, (*a*) which denied relief and dismissed the complaint, and (*b*) which although granting relief, did not give the complainant the measure of

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relief to which he thought himself entitled. That the Commerce Court has no jurisdiction of controversies of these classes of cases was determined in Procter and Gamble *vs.* U. S.; opinion Supreme Court, June 7, 1912.

While Congress may within recognized limits make the findings of fact and determinations of an administrative official final, it has usually provided by legislation for some measure of review, particularly if any of the duties are judicial or quasi-judicial. As to the Commission, its decisions against a complaining shipper are now final, but if against a respondent carrier are proper subjects of judicial review. There is therefore a kind of presumption that when deciding against a shipper the Commission is right and when deciding against a carrier it is wrong.

Manifestly in fairness jurisdiction should be given to the courts to entertain petitions by shippers who have been denied relief by the Commission. In order, however, to give to shippers a full, adequate and complete remedy the power of courts in such cases needs be different than when their jurisdiction is invoked by one against whom an affirmative order has been made. The power only "to enjoin, set aside, annul, and suspend" an order would be inadequate, for after the exercise of such power the shipper would be exactly where he was when he applied to the Commission. Within the proper exercise of the judicial power in matters of this nature the courts should have such authority

as is fully adequate to meet the existing necessities and requirements.

In a very similar case, the Congress has provided that when one is aggrieved by the decision of an administrative official in the exercise of judicial and quasi-judicial duties, he may invoke the power of a designated court, which court can revise the decision of the administrative officer appealed from and which returns to the official a certificate of its proceedings and decision to govern the further proceedings in the case. The court marks out the law as applied to the facts of a particular case, in so far as judicial and quasi-judicial determination is necessary; beyond that (and mandamus to compel the performance of a ministerial duty) he is free from control by the courts. The act providing the procedure set forth was enacted in 1870 and has been held constitutional by the Supreme Court.

If similar powers be conferred on courts respecting negative orders of the Interstate Commerce Commission they would, it is respectfully submitted, meet the present demands and necessities.

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1. *The Nature of the Interstate Commerce Commission.*

Under the Act to Regulate Commerce, and independent of certain duties and powers conferred by other acts (such as safety appliance acts, hours of service acts, etc.), the Interstate Commerce Commission is beyond doubt an administrative body to which has been confided certain power, au-

thority and jurisdiction over and in respect to interstate commerce and the carriers and instrumentalities engaged in the transportation of property therein.

It was created by the act of February 4, 1887 (24 Stat. L., 379). This act has been amended from time to time, the powers of the Commission have been enlarged and its duties have been increased, both in number and importance; particularly was this accomplished by the amendments of June 29, 1906, the so-called Hepburn Law (34 Stat. L., 584).

Originally the Commission was subordinate to one of the Executive Departments, reporting to the Secretary of the Interior. After being so attached for two years, Congress by law required that the Commission report direct to it. Since 1889 (25 Stat. L., 855), it has not been attached to any of the three grand departments of the Government.

The courts are not wholly harmonious in stating the legal status of the Commission and the Commission has never seen fit fully to describe itself. It is, however, a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts (Texas and Pacific R. Co. *vs.* I. C. C., 162 U. S., 197).

Prior to the amendment to the act in 1906 the Commission was called "an administrative board" (C., N. O. & T. P. Ry. *vs.* I. C. C., 162 U. S., 184, 196); and "an administrative body" (I. C. C. *vs.* C., N. O. & T. P. Ry., 167 U. S., 479, 510).

> "It [the Commission] is neither a Federal court under the Constitution nor does it exercise judicial powers nor do its conclusions possess the efficacy of judicial proceedings."
>
> K. & I. B. Co. *vs.* L. & N. R. Co., 37 Fed., 567.

Prior to the amendment of 1906 it was said to exercise quasi-judicial powers (I. C. C. *vs.* C., N. O. & T. P. Ry. Co., 76 Fed., 183; I. C. C. *vs.* C., N. O. & T. P. R. Co., 64 Fed., 981; Texas & Pacific Ry. *vs.* I. C. C., 162 U. S., 197; I. C. C. *vs.* C., N. O. & T. P. R. R. Co., 167 U. S., 479; I. C. C. *vs.* L. & N. R. Co., 73 Fed., 409).

& N. R. Co., 73 Fed., 409).

Since the Hepburn Law of 1906, by which the powers of the Commission were increased, the Commission has said:

> "There is an analogy between the jurisdiction of the Commission and that of a court of equity."
>
> R. Com. *vs.* H. V. R. Co., 12 I. C. C., 398.

And it has also referred to itself as follows:

> "While its procedure is to some extent judicial in nature, the Commission is essentially an administrative body."
>
> M. & K. Shippers' Ass'n *vs.* M., K. & T. Ry. Co., 12 I. C. C., 483, 484.

2. *The Duties of the Commission and a Consideration of the Nature Thereof.*

The duties which the Commission is called upon to perform are many and varied. To enumerate them would serve no useful purpose at this time; for the present it will suffice to point out the fact that the duties are properly divisible into several classes according to their nature.

Certain duties are judicial or quasi-judicial, as in determining whether or not a rate is reasonable; others are legislative, as in prescribing a rate for the future.

> "It is one thing to inquire whether the rates which have been charged and collected are reasonable—that is a judicial act; but an entirely different thing to prescribe rates which shall be charged in the future—that is a legislative act. C., M. & St. P. R. *vs.* Minnesota, 134 U. S., 418, 458; Reagan *vs.* Farmers' L. & T. Co., 154 U. S., 362, 397; St. L. & S. F. R. *vs.* Gill, 156 U. S., 649, 663; C., N. O. & T. P. R. Co. *vs.* I. C. C., 162 U. S., 197, 216; Munn *vs.* Illinois, 94 U. S., 113, 114; Memphis & L. R. R. Co. *vs.* Sou. Exp. Co., 117 U. S., 1;" I. C. C. *vs.* C., N. O. & T. P. R. Co., 167 U. S., 479, 499.

Other duties, particularly those relating to the interior management of the Commission, are clearly administrative.

Still others are in part of one class and in part another. The power and duty prescribed by section 12 to execute and enforce the provisions of the

act were considered by the Supreme Court in I. C. C. *vs.* C., N. O. & T. P. R. Co., 167 U. S., 479, 501:

> "The power given is the power to execute and enforce, not to legislate. The power given is partly judicial, partly executive and administrative, but not legislative."

3. *The Orders of the Interstate Commerce Commission.*

In addition to the orders of the Commission respecting the keeping of accounts, the form of reports of carriers and general orders of like kind, the Commission makes and enters orders in formal cases; these orders close (subject to petition for rehearing) the controversy and proceedings before the Commission and are analogous to final decrees in equity courts.

In form orders are (*a*) affirmative, as those granting relief by requiring carriers to cease and desist from charging unreasonable rates and following discriminatory practices, and prescribing reasonable rates and non-discriminatory practices; or (*b*) denying relief, as those dismissing the complaint of the shipper. Orders to accomplish other purposes than those stated necessarily fall within the above classification.

4. *How Orders Were and Are Enforceable.*

Prior to the act of June 29, 1906, the orders of the Commission, if affirmative in their nature, were

enforceable in the Federal courts by a bill by the Commission or by any party injured by the failure of the carrier to obey the order. This procedure is still permissible in the Commerce Court, and in addition to the Commission and any party injured, the United States may by the Attorney General file an appropriate bill.

The act of June 29, 1906 (34 Stat. L., 584), made the orders of the Commission self-executing or self-enforcing. The failure, neglect, or refusal to obey them within the time limit thereof was made punishable by heavy penalties. A method for annulling them, inasmuch as the Commission was not a court, was under the Constitution necessary. He against whom the order ran was entitled to his day in court.

By the act of June 30, 1906 (34 Stat. L., 584), was fixed the venue of circuit courts of the United States in "suits to enjoin, set aside, annul or suspend any order or requirement" of the Commission and jurisdiction "to hear and determine such suits is hereby vested in such courts."

This jurisdiction (and jurisdiction over certain other classes of cases) was transferred to the Commerce Court by the act of June 18, 1910, which was subsequently re-enacted as part of the Judicial Code (act, March 3, 1911).

5. *The Power of Courts to Enjoin, Set Aside, Annul, and Suspend Orders of the Commission.*

When the act of 1906 was before Congress there was a thorough appreciation of the fact that the carriers had a right to a judicial review of the orders of the Commission; whether the power of the courts should include "broad" review or "narrow" review was most freely debated, particularly in the Senate. The question was not, however, specifically decided, for to the circuit courts was given "jurisdiction to hear and determine such suits," *i. e.*, suits to enjoin, set aside, annul or suspend any order or requirement of the Commission.

It has, therefore, fallen to the Supreme Court to delineate the limitations within which the courts may act. Reviewing previous cases which had been before it for decision, the Supreme Court in Interstate Commerce Commission *vs.* Union Pacific R. Co. (222 U. S., 541, 547), said:

> "There has been no attempt to make an exhaustive statement of the principle involved, but in cases thus far decided, it has been settled that the orders of the Commission are final unless (1) beyond the power which it could constitutionally exercise; or, (2) beyond its statutory power; or (3) based upon a mistake of law. But questions of fact may be involved in the determination of questions of law, so that an order, regular on its face, may be set aside if it appears that (4) the rate is so low as to be confiscatory and in violation of the constitutional

prohibition against taking property without due process of law; or (5) if the Commission acted so arbitrarily and unjustly as to fix rates contrary to evidence, or without evidence to support it; or (6) if the authority therein involved has been exercised in such an unreasonable manner as to cause it to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

6. *The Courts Have No Jurisdiction Over Negative Orders of the Commission.*

In the course of the many decisions of the Commission complaining shippers who had been denied relief became aggrieved and being of opinion that the Commission had erred and denied substantial rights filed petitions in the Commerce Court for a judicial decision of the controversy and to enjoin, set aside, annul, and suspend the negative orders of the Commission. The case first determined was Procter and Gamble *vs.* United States, involving the right of carriers to charge demurrage on private cars while on private tracks. The Commission had held that the carriers had the right. On petition to the Commerce Court, the United States moved to dismiss on jurisdictional grounds. That court held it had jurisdiction but sustained the right of the carriers to assess demurrage under the circumstances stated, thereby agreeing with the Commission.

The case was appealed to the Supreme Court,

which held that the Commerce Court had no jurisdiction of cases in which the Commission had dismissed the complaint of a shipper. The Chief Justice, speaking for the court, after quoting the power conferred upon the Commerce Court over

> "Cases brought to enjoin, annul, or suspend in whole or in part any order of the Interstate Commerce Commission,"

said:

> "Giving to these words their natural significance we think it follows that they confer jurisdiction only to entertain complaints as to affirmative orders of the Commission; that is, they give the court the right to take cognizance when properly made of complaints concerning the legality of orders, rendered by the Commission and confer power to relieve parties in whole or in part from the duty of obedience to orders which are found to be illegal."

It therefore follows that in no case in which the Commission has dismissed a complaint, even by a divided Commission, can the complaining shipper go farther; whatever errors may have been made by the Commission, nevertheless the shipper is thereafter remediless.

Under the doctrine laid down in the Procter and Gamble case the Supreme Court dismissed the appeal in Hooker *et al. vs.* Knapp *et al.* (involving the reasonableness of rates from Cincinnati to Chattanooga) and The Eagle White Lead Co. *et al. vs.*

Interstate Commerce Commission. By reason of the same decision the Commerce Court of its own motion dismissed the following cases for want of jurisdiction, or they were subject to have been so dismissed:

Anaconda Copper Mining Co. *et al. vs.* United States.

Crane Iron Works *vs.* United States.

O'Gara Coal Co. *et al. vs.* United States et al.

Cattle Raisers' Association of Texas *et al. vs.* United States.

Chamber of Commerce of City of Augusta, Ga., *vs.* United States and Interstate Commerce Commission.

International Salt Co. of Illinois *et al. vs.* United States and Interstate Commerce Commission.

Louisiana & Pacific Ry. Co. *et al. vs.* Interstate Commerce Commission, United States, *et al.*

Woodworth & Louisiana Central Ry. Co. *et al. vs.* Interstate Commerce Commission, United States, *et al.*

Sibley, Lake Bisteneau & Southern Ry. Co. *vs.* United States and Interstate Commerce Commission.

The twelve cases indicate the great importance of having a review of the decisions of the Commission, for they constitute one-sixth of all the cases filed in or transferred to the Commerce Court. The demand is not single and stray but great and broadspread.

7. *The Right to Invoke the Federal Judicial Power Should Be Mutual.*

There would seem to be no argument against conferring upon the courts jurisdiction to hear and determine controversies which have been decided adversely to the complaining shipper. Since the Abeline case (204 U. S., 426) he must initiate his proceeding (if he complains of certain matters) before the Interstate Commerce Commission, for its jurisdiction and power in particular controversies is original and exclusive.

The denial of the same right of review to the shipper as is accorded the carrier is beyond doubt a denial of that equality of the law which is fundamental in the Constitution, even if (which seems likely) the shipper is not denied due process of law.

Our jurisprudence has zealously guarded the right of the individual and particularly against erroneous and arbitrary action by administrative and quasi-judicial officials. If a committing magistrate act erroneously one has *habeas corpus;* if an administrative official fail to perform a ministerial act mandamus lies, and in this behalf the courts have broadened rather than narrowed the remedy. Not only have the courts appreciated and kept inviolate the rights of the individual, but Congress itself has usually protected by appropriate legislation his rights. Instance the applicant for a patent; if the individual be denied one, he has from early days been permitted a review and revision of the decision of the Commissioner of Patents. Early in our

history he had the right to appeal to a board; more recently and since 1870, he may invoke the judicial power by an appeal thereto. (5 Stat. L., 117; R. S. U. S., secs. 4906 *et seq.;* 27 Stat. L., 434, ch. 74.)

8. *Powers Necessary to be Conferred in Respect to Negative Orders to Give Adequate Relief.*

It is manifest that if to the courts be given only the power to enjoin, set aside, annul, and suspend negative orders of the Commission, the power will not be commensurate with the relief to which one is in justice entitled. The setting aside of or similar action regarding a negative order would leave the petitioner before the court practically where he was as complainant before the Commission. The authority of the courts must be sufficiently broad and comprehensive to give adequate relief.

There are of course matters which cannot properly be placed within and subject to the judicial power; but matters judicial or quasi-judicial in their nature are proper subjects for judicial determination (Murray *vs.* Hoboken L. & I. Co., 18 How., 284).

In its administrative functions the Commission is not subject to control (I. C. C. *vs.* Humboldt S. S. Co., 224 U. S., 474). In its legislative functions it should be as subject to revision by the courts at the instance of shippers as at the instance of carriers. In its judicial and quasi-

judicial functions it may constitutionally be made subject to the judicial power (U. S. *ex rel.* Bernardin *vs.* Duell, 172 U. S., 576).

To give adequate relief the courts must be endowed, not with purely revising power, for probably such power would vitiate the grant, but with power to mark out the law as applied to particular facts and to certify the law in the case to the Commission for its guidance in further proceedings therein. Such is the power and procedure in patent appeals, which has stood the test of the Constitution (U. S. *ex rel.* Bernardin *vs.* Duell, 172 U. S., 576).

The analogy between the two situations is complete. Each,—the office of the Commissioner of Patents and the Interstate Commerce Commission,—are administrative in their nature; each performs certain ministerial and judicial or quasi-judicial functions. To secure justice through the exercise of the judicial power one may have an appeal to the courts for the purpose of securing a patent or determining priority in an interference case. Appeal to the courts or right of judicial review is unfortunately now denied one who has failed for any reason to make a case before the Interstate Commerce Commission.

It may be said that if to the courts be given the power of review of negative orders carriers, as well as shippers, may in such cases appeal to the courts. This is true, for carriers may under the act seek relief from the Commission; but if the Commission is wrong, ought not any one injured

by the wrong be entitled to have the wrong righted? If, again, it be said (as it has been) that the Commission is the shippers' friend, and one can rely that every intendment in favor of the shipper will be given, it can properly be replied that Commission is *not supposed to be* a biased or prejudiced body, and that the number of cases in the Commerce Court heretofore filed by shippers shows that the Commission does not always decide with the shippers.

9. *What Court Should be Invested with Power in the Premises.*

As transportation law is technical, as the facts are complex, as the domain of investigation is broad, and as unanimity and promptness of decision is desirable, it is submitted that the power to be conferred should be conferred upon the Commerce Court. No one will deny that these transportation questions are "matters involving public rights which may be [and usually are] presented in such form that the judicial power is capable of acting upon them and which are susceptible of judicial interpretation." And no one with even slight familiarity with the subject will deny the advantage of the judgment of a trained body of skilled judges, expert in all the intricacies of this special branch of the law.

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